

Moreno Bros., Inc. and Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union, Local 630, International Brotherhood of Teamsters, AFL-CIO. Case 21-CA-30418

October 20, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

Upon a charge and an amended charge filed by the Union on December 9, 1994, and January 6, 1995, respectively, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on March 9, 1995, against Moreno Bros., Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent failed to file an answer.

On September 18, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On September 20, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent's attorney, by letter dated September 7, 1995, advised the Region that the Respondent will not be filing an answer to the complaint.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, was engaged in business as a wholesale produce dealer at its facility located at 1601 East Olympic Boulevard, Los Angeles, California, until

about November 26, 1994. Annually, until November 26, 1994, the Respondent, in conducting its business operations, purchased and received at its Los Angeles, California facility goods valued in excess of \$50,000 directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (unit A and unit B) constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A:

Repackers of commodities, including fruit, produce and vegetables, for distribution from broken bulk; excluding office clerical employees, janitors and supervisors as defined in the Act.

UNIT B:

All sales persons, freezer persons, receiving clerks, dispatchers, drivers/forklift operators, receiver helpers, housemen, semi drivers, double drivers and loaders; excluding all office clerical employees, janitors and supervisors as defined in the Act.

At all times material herein, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of employees in the foregoing units and the Respondent has recognized the Union as the exclusive collective-bargaining representative in both units. Such recognition was embodied in successive collective-bargaining agreements, the most recent of which by their terms were for the following periods:

a) February 1, 1990, through September 30, 1994, covering the wages, hours, and other terms and conditions of employees in unit A.

(b) February 1, 1990, through January 31, 1993, covering the wages, hours, and other terms and conditions of employees in unit B.

(c) Upon the expiration of the collective-bargaining agreement with respect to the employees in unit B, the Respondent voluntarily agreed to apply the terms of the collective-bargaining agreement (effective from February 1, 1993, to January 31, 1996) between the Associated Produce Dealers and Brokers of Los Angeles, Inc., and the Union, to the employees in unit B. This collective-bargaining agreement covered the wages, hours, and other terms and conditions of employees in unit B, from January 31, 1993, to November 25, 1994.

The collective-bargaining agreements set forth above in (a) and (c) contained provisions for pension trust

funds and health and welfare trust funds, and required that the Respondent make monthly contributions on behalf of unit employees. The Respondent failed to make such required payments to trust funds on behalf of unit employees in both units for the months of October and November 1994.

The collective-bargaining agreement set forth in (a) also included a valid union-security clause and a checkoff provision whereby, upon the voluntary consent of employees in unit A, the Employer could deduct union dues from their pay and remit the same to the Union. Beginning about September 1, 1994, the Respondent continued to deduct union dues from employees' pay for employees in unit A but failed to remit those same moneys to the Union.

About November 25, 1994, the Respondent laid off employees in unit A and unit B, and closed its operations and facility. At the time of the layoffs, the Respondent failed to pay unit employees in both units severance pay required under the terms and conditions of the most recent collective-bargaining agreements set forth above in (a) and (c) and failed to pay employees in unit B the accrued sick leave benefits they were entitled to receive at layoff under the provisions of the collective-bargaining agreement set forth in (c).

The subjects set forth above relate to the wages, hours, and other terms and conditions of employment of the employees in unit A and unit B and are mandatory subjects for the purposes of collective bargaining. Nevertheless, the Respondent engaged in the conduct described above without the consent of the Union, without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and about the effects of the decision to close the business upon employees in both units.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully failed to make required payments to trust funds on behalf of employees in units A and B for the months of October and November 1994, we shall order

the Respondent to make whole the unit employees by making all such delinquent payments, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

In addition, having found that the Respondent has unlawfully failed, since about September 1, 1994, to remit to the Union dues that were deducted from the pay of employees in unit A pursuant to valid dues-checkoff authorizations, we shall order the Respondent to remit such withheld dues to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

Further, having found that the Respondent unlawfully failed, at the time it laid off the employees about November 25, 1994, to pay the employees in both units severance pay and to pay employees in unit B accrued sick leave benefits as required by the agreements, we shall order the Respondent to make the unit employees whole by paying them the severance pay and accrued sick leave benefits due under the agreements, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in order to remedy the Respondent's unlawful failure to give the Union timely notice and a meaningful opportunity to bargain about the effects of the decision to close its facility on the unit employees, we shall order it to bargain with the Union, on request, over the effects of that decision. To ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the laid-off employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

¹ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Thus, the Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 290 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the Respondent's closure of its facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Moreno Bros., Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union, Local 630, International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the following units, by failing to make payments to trust funds on behalf of employees in both units as required by its collective-bargaining agreements with the Union, failing to remit dues to the Union that were deducted from the pay of employees in unit A pursuant to valid dues-checkoff authorizations as required by the agreement, failing to pay the employees in both units severance pay and the employees in unit B accrued sick leave benefits upon their layoff as required by the agreements, and failing to give the Union prior notice

and an opportunity to bargain concerning the effects of its decision to close its facility on the unit employees:

UNIT A:

Repackers of commodities, including fruit, produce and vegetables, for distribution from broken bulk; excluding office clerical employees, janitors and supervisors as defined in the Act.

UNIT B:

All sales persons, freezer persons, receiving clerks, dispatchers, drivers/forklift operators, receiver helpers, housemen, semi drivers, double drivers and loaders; excluding all office clerical employees, janitors and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required payments to the trust funds for the months of October and November 1994 which have not been made, and make the employees in both units whole for any expenses they incurred as a result of its failure to make the required trust fund payments, as set forth in the remedy section of this decision.

(b) Pay the required severance pay to the employees in both units and the required accrued sick leave benefits to the employees in unit B who were laid off about November 25, 1994, with interest, as set forth in the remedy section of this decision.

(c) Remit to the Union all dues that it deducted from the pay of the employees in unit A pursuant to valid checkoff authorizations but failed to remit since September 1, 1994, with interest, as set forth in the remedy section of this decision.

(d) Bargain on request with the Union over the effects on unit employees of the closure of its facility, reduce to writing any agreement reached as a result of such bargaining, and pay limited backpay to the unit employees for its previous failure to do so, as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Mail signed and dated copies of the attached notice marked "Appendix," to the Union and to all unit employees employed as of the date the Respondent closed its facility.² Copies of the notice, on forms pro-

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

vided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent to the last known address of each employee.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union, Local 630, International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the following units, by failing to make payments to trust funds on behalf of employees in both units as required by our collective-bargaining agreements with the Union, failing to remit dues to the Union that were deducted from the pay of employees in unit A pursuant to valid dues-checkoff authorizations as required by the agreement, failing to pay the employees in both units severance pay and the employees in unit B accrued sick leave benefits upon their layoff as required by the agreements, and failing to give the Union prior notice and an opportunity to bargain concerning the effects of our decision to close our facility on the unit employees:

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UNIT A:

Repackers of commodities, including fruit, produce and vegetables, for distribution from broken bulk; excluding office clerical employees, janitors and supervisors as defined in the Act.

UNIT B:

All sales persons, freezer persons, receiving clerks, dispatchers, drivers/forklift operators, receiver helpers, housemen, semi drivers, double drivers and loaders; excluding all office clerical employees, janitors and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make all required payments to the trust funds for the months of October and November 1994 which have not been made, and WE WILL make the employees in both units whole for any expenses they incurred as a result of our failure to make the required trust fund payments, with interest.

WE WILL pay the required severance pay to the employees in both units and the required accrued sick leave benefits to the employees in unit B who were laid off about November 25, 1994, with interest.

WE WILL remit to the Union all dues that we deducted from the pay of the employees in unit A pursuant to valid checkoff authorizations but failed to remit since September 1, 1994, with interest.

WE WILL bargain on request with the Union over the effects on unit employees of the closure of our facility and reduce to writing any agreement reached as a result of such bargaining, and WE WILL pay limited back-pay to the unit employees for our previous failure to do so, as set forth in the Board's Decision.

MORENO BROS., INC.